

*In the Matter of Carmine Russo,
Deputy Police Chief (PM4020C),
Newark*

DOP Docket No. 2003-4567

(Merit System Board, decided August 11, 2004)

Carmine Russo, represented by Alan L. Zegas, Esq., requests reconsideration of the Merit System Board's September 25, 2002 decision denying his eligibility for the examination for Deputy Police Chief (PM4020C), Newark. A copy of that decision is attached hereto and incorporated herein.

The subject promotional examination had a closing date of November 30, 2001 and was open to employees who had one year of permanent service in the title of Police Captain. The subject list promulgated February 28, 2002 with 18 names and expires on February 27, 2005. To date, five appointments have been made.

By way of background, Mr. Russo, who was a Lieutenant with the Newark Police Department, forfeited his position as a result of a criminal conviction and a forfeiture order of March 5, 1997. Subsequently, that conviction was overturned and the State moved to dismiss the charge "based solely upon the lack of evidence available for prosecution." Mr. Russo was reinstated to his formerly held Police Lieutenant position on July 23, 2001. Following his reinstatement, Mr. Russo was permitted to take a make-up examination for Police Captain (PM3561A), which had a closing date of August 1999 and a list expiration date of April 26, 2003. Mr. Russo passed that examination, was added to the list at position 1A, and was appointed to a Police Captain position on January 22, 2002. After he received his test score from the make-up examination for Police Captain (PM3561A), the appellant requested that the score he achieved for PM3561A be used for placement on the prior Police Captain (PM1167U) eligible list and that he be retroactively appointed from that list. That examination was announced with a closing date of August 1996. The resultant eligible list promulgated January 23, 1997 and expired on March 31, 2000. The list contained 49 eligibles. At the time of its expiration, there were 35 active eligibles remaining on the list.

In its prior decision, the Board concluded that since the appellant's appointment to Police Captain occurred after the closing date for Deputy Police Chief, the appellant lacked the required year of service in the title of Police Captain and he was thus not eligible for the Deputy Police Chief examination.

On request for reconsideration to the Board, the appellant contends that his situation is unique in that he was the victim of prosecutorial misconduct, and failing to allow him to take the Deputy Police Chief examination results in continued punishment for a crime he did not commit. The appellant further

contends that the Board erred when it stated that the charges were dismissed because the State “lacked evidence available for prosecution.”

In further support of his request, Mr. Russo relies on *N.J.S.A. 2C:51-2(c)*, which calls for restoration to the prior held office, position or employment with all of the rights, emoluments and salary thereof from the day of forfeiture. Mr. Russo contends that retroactive appointment to Police Captain and the opportunity to sit for the Deputy Police Chief examination are required in order to make him whole as a result of his improper prosecution.

In response to appellant’s request for reconsideration, Robert K. Rankin, Police Director for the City of Newark, indicates that he does not object to the administration of a make-up examination for Deputy Police Chief to the appellant. On March 23, 2004, appellant provided a copy of a memorandum from former Police Director Joseph Santiago which indicated that the appellant would have been promoted to Police Captain on September 7, 2000 had he not forfeited his job. John F. Huegel, President, Newark Police Superior Officers’ Association, also supports this appointment date. However, the appointing authority took no position on this matter.

N.J.A.C. 4A:4-2.9(d) provides that employees who have been removed for disciplinary reasons or indefinitely suspended pending criminal charges, and are thereafter exonerated, shall have an opportunity to take promotional examinations that have not yet been administered, or make-up examinations for active promotional lists, if the suspension or removal resulted in the employee’s non-participation in the promotional examination.

CONCLUSION

N.J.A.C. 4A:2-1.6, in pertinent part, provides that a petition for reconsideration must show either new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding, or that a clear material error has occurred.

Appellant correctly notes that *N.J.S.A. 2C:51-2(c)* calls for restoration to the prior held office, position or employment with all of the rights, emoluments and salary thereof from the day of forfeiture. Appellant was a Police Lieutenant at the time of his forfeiture. Thus, the issue in this matter is whether appellant had a right to an appointment to a Police Captain position by virtue of his position as a Police Lieutenant.

After Mr. Russo was reinstated to his formerly held position as a Police Lieutenant, he was afforded the opportunity to take a make-up examination for

Police Captain (PM3561A) because the list for that examination was still in force when the appellant was reinstated.

N.J.A.C. 4A:4-2.9(d) permits make-up examinations in cases of removal and indefinite suspensions pending criminal charges in which the employee is later exonerated. However, in such situations, the rule permits make-up examinations only for active eligible lists. The Police Captain (PM1167U) list had expired on March 31, 2000, prior to Mr. Russo's reinstatement on July 23, 2001. Thus, no basis existed to allow Mr. Russo to take a make-up for an expired eligible list. The Board notes, however, that even if Mr. Russo were on the Police Captain (PM1167U) list, he would not derive a right to an appointment from that list. See *Nunan v. New Jersey Department of Personnel*, 244 N. J. Super. 494 (App. Div. 1990); *Schroeder v. Kiss*, 74 N.J. Super. 229 (App. Div. 1962); *In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984).

The appellant has provided a statement from former Police Director Joseph Santiago which indicated that the appellant would have been appointed on September 7, 2000 had he not forfeited his position. The Board notes that the City of Newark appointed 16 Police Captains effective September 7, 2000 from the August 22, 2000 certification of the Police Captain (PM3561A) list. When Mr. Russo was added to that list on January 10, 2002, he was placed at rank 1A¹ and was appointed January 22, 2002. The Superior Officers' Association supports appellant's requested appointment date. The appointing authority took no position. Under these circumstances, good cause exists to grant Mr. Russo a retroactive appointment date in the title of Police Captain to September 7, 2000, for seniority and record purposes only.

Even with a retroactive date of appointment of September 7, 2000, Mr. Russo did not begin serving as a Police Captain until January 22, 2002. Thus, as of the closing date for the Deputy Police Chief examination, November 30, 2001, he did not have any time served, either as a provisional or permanent Police Captain. See *In the Matter of David J. Barrett, et al.* (MSB, decided November 19, 2003). In that decision, the Board noted that, only in certain circumstances, where an administrative error, delay or omission has occurred and the employee actually served in and performed the duties of the title as of the date of the retroactive appointment, the additional relief of entitlement to promotional opportunities based on retroactive appointment dates has been granted. While the Newark Police Director has no objection to the administration of the Deputy Police Chief examination to Mr. Russo, the announcement for Deputy Police Chief required one year of permanent service as a Police Captain as of the closing date of November 30, 2001. Thus, as of the closing date, the appellant lacked the required year of service in the title of Police Captain.

¹ Appellant's score places him third on the eligible list behind rank A and 1.

As to appellant's claim that the Board erred when it noted that the charges against the appellant were dismissed because the State "lacked evidence available for prosecution," the Board notes that this language was paraphrased from the Dismissal provided by the appellant in his initial appeal. The Dismissal indicates that, "[T]he State possesses insufficient evidence to prove defendant's guilt beyond a reasonable doubt. Accordingly, the State moves for dismissal of the above charge based solely upon the lack of evidence available for prosecution."

A thorough review of all material presented indicates that, although the appellant has supported the appropriateness of a retroactive appointment date of September 7, 2000 as a Police Captain for seniority and record purposes, the portion of the decision by the Merit System Board, that appellant was not eligible to sit for the examination for Deputy Police Chief because he lacked the required year of permanent service as a Police Captain by the announced closing date, is amply supported by the record and appellant has provided no basis to disturb that decision. Thus, appellant has failed to support his burden of proof on this issue.

ORDER

Therefore, it is ordered that this request be granted in part and that appellant's seniority be adjusted for record purposes only to reflect an appointment to Police Captain on September 7, 2000. The Board further orders that the remainder of this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.